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No. 76-546

In the Supreme Court of the United States

OCTOBER TERM, 1976

FRANK W. SHARP, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
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Petitioner seeks access to documents that the Federal Deposit Insurance Corporation holds as receiver of an insolvent state bank.

Petitioner is a stockholder in the Sharpstown State Bank of Houston, Texas (C.A. App. 4).[1] The bank has been closed by its directors and placed in the hands of the Texas Banking Commissioner for liquidation (Pet. App. 1a-2a). The Commissioner appointed the Federal Deposit Insurance Corporation receiver (Pet. App. 2a).

On July 9, 1975, petitioner made a written request to the F.D.I.C., pursuant to the Freedom of Information Act, 5 U.S.C. 552, for copies of all documents in the F.D.I.C.'s possession arising out of its role as receiver of the bank

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[1] "C.A. App." refers to the appendix in the court of appeals.

(Pet. App. 11a). The request was denied on the grounds that the Act does not apply to the F.D.I.C. in its role as receiver of state-chartered banks and that the request was, in any event, so broad that it did not adequately describe the documents requested (Pet. App. 13a, 15a, 17a).

Petitioner then commenced this suit for injunctive relief in the United States District Court for the District of Columbia. The district court granted F.D.I.C.'s motion to dismiss on October 15, 1975, on the ground that the court lacked jurisdiction over either the F.D.I.C. in its capacity as receiver of Sharptown State Bank or the records of the receivership (Pet. App. 8a). The district court further held that the Freedom of Information Act does not apply to the F.D.I.C. as receiver of a state bank or to the records compiled or maintained by it in that capacity (Pet. App. 8a-9a).

On November 24, 1975, petitioner filed a motion in the state court that has jurisdiction over the receivership, requesting an order requiring the F.D.I.C. to produce a large volume of information regarding the status of the receivership (C.A. App. 22-23). Petitioner's motion was granted on December 4, 1975 (C.A. App. 24).

Petitioner nevertheless appealed the dismissal of his federal court action. The court of appeals affirmed on the ground that the records requested by petitioner are *in custodia legis* before a state court in receivership proceedings to which petitioner is a party, and that petitioner should seek his discovery in that court (Pet. App. 1a-3a).

The decision below is correct, it does not conflict with the decision of any other court of appeals, and petitioner has advanced no claim warranting further review by this Court.

1. Petitioner contends (Pet. 9) that the court of appeals incorrectly relied upon provisions of the Texas Banking

Code (Tex. Ann. Civ. Stat. Art. 342-806 (1973); see Pet. App. 21a). That statute provides that the assets of the insolvent bank shall be deemed to be in the custody of the state court in which the receivership proceedings are pending and that the state court shall have exclusive jurisdiction of all suits and orders in the receivership proceedings (*ibid.*). The court of appeals correctly ruled that the records sought by petitioner were "assets" of the closed bank, and that the Texas statute brought such assets within the custody of the supervising state court. *Arlitt* v. *Seaboard Bank & Trust Co.*, 31 S.W. 2d 488 (Tex. Civ. App.).

Petitioner apparently has conceded that this is the case. He intervened in the receivership proceedings to seek an order of the state court requiring the receiver to compile extensive lists and schedules of information requested by petitioner. The court of appeals correctly held that petitioner thereby became a party to the receivership proceedings and that petitioner should seek any further discovery of documents in those proceedings (Pet. App. 3a, 7a).

2. Contrary to petitioner's contentions (Pet. 5-8), the court of appeals also was correct in ruling that the records compiled or maintained by state bank receivers, including the F.D.I.C., are not subject to disclosure under the Freedom of Information Act. The F.D.I.C., in its capacity as the receiver of an insolvent bank, stands in the shoes of that bank. See *Freeling* v. *Sebring*, 296 F. 2d 244, 245 (C.A. 10); *Federal Deposit Insurance Corporation* v. *Glickman*, 450 F. 2d 416 (C.A. 9); 12 U.S.C. 1821(e), 1823. The F.D.I.C.'s distinct duties as receiver are to liquidate the assets of the bank and to distribute the proceeds in accordance with applicable state law and under the supervision of the state court. These duties do not involve the processes of federal governance to which the Freedom of Information Act is directed. Neither the language nor the legislative history of the Act indicates

that Congress intended to extend its coverage to the F.D.I.C.'s separate capacity as a state court receiver and thereby to expand the discovery rights of litigants in state receivership proceedings. Cf. *Renegotiation Board* v. *Bannercraft Co.*, 415 U.S. 1, 24.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1976.